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03-6821 (3)

No. _____

IN THE UNITED STATES SUPREME COURT

October Term, 2003

LODGING
FILED
OCT - 9 2003
CLERK

DAVID LARRY NELSON,
Petitioner,

vs.

DONAL CAMPBELL,
In his individual and official capacity as
Commissioner of the Alabama Department of Corrections,
and
GRANTT CULLIVER,
In his individual and official capacity as Warden of William C.
Holman Correctional Facility,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Execution scheduled for 6:00 p.m. Central Time on October 9, 2003

Cut-down procedure expected to begin at approximately 4:00 p.m. Central Time

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Counsel for Petitioner
David Larry Nelson

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IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

DAVID LARRY NELSON Petitioner, vs DONAL CAMPBELL, Commissioner, Department of Corrections, and GRANTT CULLIVER, Warden, Holman Correctional Facility Respondents.	)	No. _____

MOTION FOR LEAVE
TO PROCEED IN FORMA PAUPERIS

COMES NOW Petitioner David Larry Nelson, by and through undersigned counsel, who seeks leave to file the attached Petition for Writ of Certiorari in the United States Supreme Court without prepayment of fees and costs, and to proceed in forma pauperis, pursuant to Rule 39 of the Rules of this Court, and shows the following:

1.

The Petitioner has been incarcerated since January 1978.

2.

The Petitioner is currently under a sentence of death and incarcerated under the custody of the State of Alabama at Holman State Prison in Atmore, Alabama.

3.

The Petitioner has an execution date of October 9, 2003 at 6:00 p.m. Central Time.

4.

The Petitioner was allowed to proceed in forma pauperis in District Court and before the United States Court of Appeals for the Eleventh Circuit.

5.

Given the Petitioner's indigency, undersigned counsel have been appointed to represent him under the Criminal Justice Act.

WHEREFORE the Petitioner respectfully requests that he be allowed to proceed in forma pauperis.

Respectfully submitted,

_____
Michael Kennedy McIntyre
Counsel for David Larry Nelson

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IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

DAVID LARRY NELSON)
)
Petitioner,)
) No. _____
vs)
)
DONAL CAMPBELL,)
Commissioner, Department of Corrections,)
)
and GRANTT CULLIVER,)
Warden, Holman Correctional Facility)
Respondents.)

CERTIFICATE OF SERVICE

I, Michael Kennedy McIntyre, do hereby certify that a copy of the foregoing Motion for Leave to Proceed In Forma Pauperis has been served via facsimile transmittal upon:

Mr. Michael Billingsley
Deputy Attorney General
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
Fax No. (334) 242-2848

Dated: This _____ day of October, 2003.

Michael Kennedy McIntyre
Counsel for David Larry Nelson

No. 03A308

LODGING

IN THE UNITED STATES SUPREME COURT

October Term, 2003

Supreme Court, U.S.
FILED
OCT 2003
CLERK

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In his individual and official capacity as
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In his individual and official capacity as Warden of William C. Holman
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Respondents.

Supreme Court, U.S.
FILED
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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR STAY OF EXECUTION

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Cut-down procedure expected to begin at approximately 4:00 p.m. Central Time

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H. VICTORIA SMITH
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Counsel for Petitioner
David Larry Nelson

* Counsel of Record

No._____

IN THE UNITED STATES SUPREME COURT

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR STAY OF EXECUTION

Petitioner David Larry Nelson is scheduled to be executed in Alabama at 6:00 p.m. Central Time on Thursday, October 9. Mr. Nelson has filed a Petition for Writ of Certiorari in this Court.

Because the Petition for Writ of Certiorari raises important legal questions, Mr. Nelson respectfully asks that this Court issue an immediate stay of execution, until such time as all Justices have had an opportunity to review the petition.

Respectfully submitted,

_____
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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a true and correct copy of this Motion for Stay of Execution by facsimile transmittal to the following:

Mr. Michael B. Billingsley
Assistant Attorney General
11 South Union Street
Montgomery, Alabama 36130
Fax No. (334) 242-2848

Dated: This ____ day of October, 2003.

Michael Kennedy McIntyre

LODGING

No. _____

IN THE UNITED STATES SUPREME COURT

October Term, 2003

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Counsel for Petitioner
David Larry Nelson

* Counsel of Record

QUESTIONS PRESENTED

1. Whether an action brought by a death-sentenced prisoner pursuant to 42 U.S.C. § 1983, which does not attack a conviction or sentence, is - simply because the person is under a sentence of death - to be treated as a habeas corpus case subject to the restriction on successive petitions which categorically precludes review of *any* constitutional violation not related to innocence (as the Fourth, Fifth and Eleventh Circuits hold), or can be maintained as § 1983 action (as the Sixth, Eighth and Ninth Circuits and several lower courts hold)?

2. Whether a cut-down procedure which involves pain and mutilation, conducted prior to an execution by lethal injection, violates the Eighth Amendment to the United States Constitution?

LIST OF PARTIES

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ATTACHMENT 4 Code of Alabama §15-18-81

ATTACHMENT 5 Correspondence to Alabama Department of Corrections Requesting Lethal Injection Protocol

ATTACHMENT 6 Alabama Department of Corrections Response Denying Request for Lethal Injection Protocol

ATTACHMENT 7 Affidavit of Mark Sonnier Dated October 11, 2003 and Notorized October 7, 2003

ATTACHMENT 8 Affidavit of Mark Heath, M.D. Dated October 7, 2003

ATTACHMENT 9 Affidavit of Mark Heath, M.D. Date October 6, 2003

ATTACHMENT 10 Order Entered by the United States District Court for the Middle District of Alabama

ATTACHMENT 11 Order entered by the United States Court of Appeals for the Eleventh Circuit

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner David Larry Nelson respectfully prays that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Order entered by the United States Court of Appeals for the Eleventh Circuit is attached as Attachment 11. The Order entered by the United States District Court for the Middle District of Alabama is attached as Attachment 10.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit issued its judgment on October 8, 2003. Jurisdiction is vested in this Court pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the United States Constitution, which provides in pertinent part:

> [N]or [shall] cruel or unusual punishment be imposed.

and the Fourteenth Amendment to the United States Constitution, which provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

This case also involves application of 28 U.S.C. § 2244, the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), which provides, in pertinent part:

> (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless -
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B) the factual predicate for the claim could not have been discovered

> previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS:

David Larry Nelson brought this action pursuant to 42 U.S.C. § 1983 to challenge the cut-down procedure which the Respondents intend to utilize in order to gain venous access prior to Mr. Nelson's execution. The cut-down procedure involves pain and mutilation. Mr. Nelson asserted that the Respondents should utilize the percutaneous central line placement to gain venous access. As such, Mr. Nelson was not and is not challenging the validity of his conviction or sentence but is challenging the cut-down procedure which will be utilized prior to his execution.

The District Court treated the action as a successive habeas petition and found that it did not have jurisdiction. Attached as Attachment 10. In so finding the District Court stated:

> It would seem that there should be a process by which Nelson can seek enforcement of his Eighth Amendment rights. (Attachment 10 at page 13).

On October 8, 2003 a Panel of the Eleventh Circuit affirmed the District Court by a vote of 2 to 1. Attached as Attachment 11. In dissent, Judge Wilson stated:

> In light of the clear authority indicating that Nelson's claim should be construed exclusively under §1983, I strongly disagree with the majority's holding. (Attachment 11 at page 7)
>
> Nelson seeks only a temporary stay of execution until concerns regarding the manner of his execution are addressed. (Attachment 11 at page 7)

> The "cut down" procedure that is to be used in his execution is not within Alabama's execution procedure, nor has it been reviewed to ensure that it passes muster the Eighth Amendment. Nelson merely requests that a different, more humane procedure known as "percutaneous central venous- cannulation" be used to carry out his execution, rather than the outmoded and painful "cut down" procedure. Regardless of which procedure is used, Nelson will be executed by lethal injection in accordance with his sentence. However, with the implementation of the "cut down" procedure, Nelson's Eighth Amendment rights may be compromised in the process. (Attachment 11 at page 9-10).

B. STATEMENT OF FACTS:

Petitioner David Nelson presently is incarcerated at William C. Holman Correctional Facility in Atmore, Alabama (hereinafter referred to as "Holman"). The Petitioner is scheduled to be executed by lethal injection at 6:00 p.m. Central Time on October 9, 2003 at Holman.

The Petitioner was transferred to Holman from Donaldson Correctional Facility in Bessemer, Alabama (hereinafter referred to as "Donaldson") upon his death warrant being issued by this Court.

The Petitioner has severely compromised veins and has encountered problems over the last two decades with prison medical personnel gaining venous access during routine physical examinations. On at least one occasion, prison medical personnel has relinquished control of medical apparatus to the Petitioner for the Petitioner to draw his own blood after failed attempts by the

medical personnel to do same.[1]

Counsel for the Petitioner contacted Warden Grantt Culliver prior to the Petitioner's transfer from Donaldson to Holman and informed Warden Culliver of the Petitioner's physical problems regarding his veins and of concerns regarding the protocol for gaining venous access for the lethal injection procedure. At that time, counsel for the Petitioner requested that either a private practice physician hired by the Petitioner be allowed to examine and consult with the Petitioner upon his arrival at Holman regarding venous access for the lethal injection procedure or that a prison physician examine and consult with the Petitioner regarding same upon his arrival at Holman.

Warden Culliver assured counsel for the Petitioner that he would arrange for a physician to examine and consult with the Petitioner regarding this issue soon after the Petitioner's arrival at Holman. (See Correspondence from undersigned counsel Smith to Warden Culliver confirming their telephone conversation, attached to this pleading as Attachment 3). However, as of Friday, October 3, 2003, Warden Culliver had failed to have a physician so examine and consult with the Petitioner.[2] Furthermore, Warden Culliver

1 The Petitioner is unable to attach a copy of his medical records to this pleading in support of the above allegation, because the Alabama Department of Corrections has refused to allow the Petitioner access to his own medical records. (See, Correspondence to undersigned counsel Smith from the Alabama Department of Corrections, attached to this pleading as Attachment 2).

2 It is anticipated that the Respondent will claim that the Petitioner has waited until the "last minute" to seek relief. However, it should be noted that the Petitioner has continuously and consistently since mid-August 2003 attempted to have the Petitioner examined by a physician, to acquire the State of Alabama's written protocol for the legal procedure of execution by lethal injection and/or for the medical procedure that will be necessary to be performed as a predicate

refused repeated requests that a private physician hired by the Petitioner be allowed to examine and consult with the Petitioner.[3] Warden Culliver also has refused to allow that same private physician to conduct a telephone conference with the medical personnel Warden Culliver intends to have perform the venous access procedure prior to the Petitioner's execution or with any other prison medical personnel.

During the above-referenced telephone conversation between Warden Culliver and undersigned counsel Smith, counsel for the Petitioner also requested from Warden Culliver a copy of the State of Alabama's protocol for the lethal injection procedure. Warden Culliver refused to provide counsel for the Petitioner with same. (See Attachment 3).

Furthermore, Warden Culliver refused to provide any meaningful information concerning the protocol for the lethal injection procedure or for the medical procedure that would have to be

to the execution, and to ensure that a credentialed physician with adequate training and experience would perform the medical procedure on the Petitioner with access to proper medical equipment. The Respondent has continuously and consistently frustrated the Petitioner's efforts in these endeavors. As is set forth in detail in this pleading, on Friday, October 3, 2003, Warden Culliver informed the Petitioner that the medical procedure he originally had described to the Petitioner had been changed. It was at this time that the Petitioner came to have a good faith belief that the Respondent does not have a written protocol for the medical procedure that the Respondent intends to perform. The Petitioner immediately sought relief in the forum in which he believed was the most appropriate to seek relief from a violation of the Eighth Amendment prohibition against cruel and unusual punishments. The Petitioner filed an action pursuant to 42 U.S.C. §1983 in the United States District Court for the Middle District of Alabama. The Petitioner's appeal of the denial of said action is still pending.

3 Said refusal was a clear violation of Ala.Code 1975 §15-18-81, which provides in relevant part, "...all persons outside the said prison shall be denied access to him, except his physician and lawyer, who shall be admitted to see him when necessary to his health or for the transaction of business...". A copy of Ala.Code 1975 §15-18-81 is attached to this pleading as Attachment 4.

implemented to gain venous access to the Petitioner prior to the execution despite counsel's representation to Warden Culliver that the Petitioner had a valid basis for his concerns. (See Attachment 3).

It should be noted that counsel for the Petitioner also contacted the Alabama Department of Corrections by telephone and then by faxed correspondence to request a copy of Alabama's protocol for the lethal injection procedure and the medical procedure that would have to be implemented to gain venous access to the Petitioner as a prior to the execution. (See Attachment 5). The Alabama Department of Corrections denied this request by email response. (See Attachment 6).

Warden Culliver and a prison nurse employed at Holman met with the Petitioner on two separate occasions after the Petitioner's arrival at Holman and described to the Petitioner the procedure Warden Culliver intends to implement in order to gain venous access prior to the execution. Ironically, this nurse is the same medical personnel referenced above who had to relinquish medical apparatus to the Petitioner for the Petitioner to draw his own blood during a routine physical examination.

Notably, Warden Culliver during the first meeting with the Petitioner acknowledged to the Petitioner that the Petitioner does exhibit compromised veins. Of paramount importance, during that first meeting **Warden Culliver** also **informed the Petitioner that a**

medical procedure will have to be performed on the Petitioner prior to the Petitioner's execution in order for Warden Culliver to gain venous access.

Warden Culliver furthermore acknowledged to counsel for the Petitioner **that the Petitioner's execution will be the first instance of the State of Alabama having to perform a medical procedure prior to the execution to gain venous access**.

Based upon conversations in which counsel for the Petitioner has engaged with Warden Culliver and with the Alabama Department of Corrections, counsel for the Petitioner in good faith submits to this Court that the State of Alabama does not have as part of its lethal injection protocol written medical procedures that comport with contemporary medical standards for gaining venous access in condemned inmates such as the Petitioner prior to an execution.

Furthermore, counsel for the Petitioner in good faith submits to this Court that Warden Culliver and the Alabama Department of Corrections are designing a medical procedure to be followed as a predicate to the Petitioner's execution without being qualified to so design such medical procedure. Furthermore, counsel for the Petitioner in good faith submits to this Court that the State of Alabama is overstepping its authority in attempting to perform medical procedures outside of a medical setting without appropriate medical safeguards in an attempt to carry out the legal procedure of execution.

Warden Culliver and the Department of Corrections appear to be designing and intend to implement a medical procedure to be

performed outside of a suitably equipped medical facility as a predicate to the legal procedure of execution by lethal injection. Counsel for the Petitioner alerts this Court that the procedure as described by Warden Culliver to the Petitioner is **exceptionally** suspect and carries with it a **significant risk** that the prohibitions against cruel and unusual punishments will be violated by its use.

Specifically and as stated above, Warden Culliver and the aforementioned nurse met with the Petitioner together on two separate occasions to describe the medical procedure that Warden Culliver intends to implement with the Petitioner to gain venous access. Warden Culliver and the nurse initially described the medical procedure as (1) involving an incision of approximately 0.5 inch being made in the Petitioner's arm through which a catheter would be inserted into a vein and (2) being performed at least twenty-four hours in advance of the execution. More recently, however, Warden Culliver and the nurse informed the Petitioner that (1) the incision will be approximately two inches in length and will be made either in the Petitioner's leg or arm, (2) this medical procedure will not be performed until approximately one hour before the execution, and (3) only a local anesthetic will be used during the procedure.

In an affidavit submitted by Warden Culliver which was filed in the United States District Court for the Middle District of Alabama, Warden Culliver describes yet a third version of the procedure he will follow. Specifically:

> ... The doctor has told me that he will first attempt to connect a direct intravenous line to the femoral vein located in the thigh. If this procedure is unsuccessful, the doctor will attempt to attach a direct intravenous line to the external carotid vein located in the neck. The doctor told me that he has performed these procedures hundreds of times. The last procedure that the doctor will attempt, should it become necessary, will be to make a two inch incision in Nelson's upper arm for the purpose of locating a peripheral vein to perform a central line procedure. The doctor told me that this last procedure involves the administration of a local anesthetic.

(See Paragraph 4 of Attachment 1). Logically, if the State of Alabama had a written protocol for the medical procedure necessary to be performed immediately prior to an execution of condemned prisoners with whom peripheral intravenous access was not possible, there would be no discrepancies between Warden Culliver's descriptions of the procedure to the Petitioner.

Perhaps more troubling than the discrepancies in the descriptions of the procedures is the fact that the descriptions are evidence that **Warden Culliver has no idea what he is doing and has either no comprehension of or no concern for the risks or pain and suffering to which he intends to subject the Petitioner.**

An excerpt from Warden Culliver's Affidavit that describes the medical procedure he intends to use prior to the Petitioner's execution has been reproduced above. Dr. Marc Sonnier, with whom Warden Culliver consulted, also submitted an Affidavit in the United States District Court for the Middle District of Alabama and basically described the procedure to be performed as Warden

Culliver did in his affidavit. Notably Dr. Sonnier's affidavit was dated October 11, 2003 but was notorized on October 7, 2003. Also, Dr. Sonnier claims that if attempts to locate and attach the intravenous line to the femoral vein located in the upper thigh of Mr. Nelson are unsuccessful, an attempt will then be made to "attach the intravenous line to the **external carotid vein** in the neck." (See Paragraphs 2 and 3 of Affidavit of Dr. Marc Sonnier, attached to this pleading as Attachment 7)(emphasis supplied).

As is made clear by the Affidavit of Mark Heath, M.D.[4], which was submitted to the United States District Court for the Middle District of Alabama on behalf of the Petitioner and which is attached to this Brief as Attachment 8, **the "external carotid vein" does not exist in human beings**. (See Paragraph 5 of Attachment 8). The term "external carotid vein" is not listed in Stedman's Medical Dictionary or in Dorland's Medical Dictionary. (See Paragraph 6 of Attachment 8). Furthermore, Dr. Ernest April, Course Director of the Gross Anatomy Course at the Columbia College of Physicians and Surgeons, has never heard of the term "external carotid vein." (See Paragraph 7 of Attachment 8).

It cannot be stressed enough that Warden Culliver is not operating with a sufficient knowledge base concerning the medical procedure which necessarily must be performed on the Petitioner as a predicate to the legal procedure of execution to design, perform,

4 Dr. Mark Heath is a licensed physician who is a Board Certified anesthesiologist and assistant professor at Columbia University College of Physicians and Surgeons.

or oversee this medical procedure. Furthermore, the medical "experts" with whom Warden Culliver is consulting (a physician who refers to non-existent parts of human anatomy and a nurse who had to relinquish control of medical apparatus to her patient to draw his own blood) are undeniably unqualified to be in the position of advising Warden Culliver regarding such matters.

As yet more evidence of this assertion is the fact that Warden Culliver described the procedure to undersigned counsel on October 3, 2003 as basically being that described to the Petitioner during his second meeting with Petitioner - - which involved a two inch incision being made in the Petitioner and a catheter being inserted through the incision into a vein-- but also claimed that the procedure would not be a cut-down procedure.

According to Board Certified anesthesiologist Dr. Mark Heath, the procedure described by Warden Culliver is precisely a cut-down procedure. (See Paragraph 8 of the Affidavit of Mark Heath, M.D., attached to this pleading as Attachment 9). Again, it is clear that Warden Culliver does not have the requisite knowledge base to be in charge of designing, performing, or overseeing this medical procedure.

Based upon the descriptions of the procedure Warden Culliver has given the Petitioner and undersigned counsel, based upon a telephone conversation between undersigned counsel Smith and Mr. Andy Redd of the legal department of the Alabama Department of Corrections, and based upon the aforementioned Affidavit of Dr. Sonnier which was submitted in the District Court, undersigned

counsel in good faith believes that Warden Culliver in fact does intend to perform a cut-down procedure on the Petitioner to gain venous access prior to the Petitioner's execution by lethal injection.

A cut-down procedure is an invasive and barbaric medical procedure which does not comport with the contemporary practice of medical care. [See Paragraphs 21, 22, 23, and 24 of the Affidavit of Mark Heath, M.D. attached to this pleading as Attachment 9. Cites to this Affidavit in the following paragraphs will be as follows: Heath Affidavit 9:appropriate paragraph number(s)].

This medical procedure is invasive, it may give rise to serious medical complications, it involves unnecessary pain and suffering, it involves the mutilation of the Petitioner's body, and there are better methods available for a qualified physician to perform on the Petitioner to gain venous access which would comport with contemporary medical care standards. (Heath Affidavit 9:18, 20, 21, 22, 23, and 24).

According to Dr. Heath, a cut-down procedure involves making a series of surgical incisions through the skin, through the underlying connective tissue, through the underlying layers of fat, through the underlying layers of muscle, until the region surrounding a large vein is reached. Heath Affidavit 9:9). During a cut-down procedure, blood vessels may have to be closed either by the use of cautery or the use of ligatory suture. (Heath Affidavit 9:11).

Furthermore, cut-down procedures are usually performed under deep sedation that includes the administration of potent intravenous analgesics (drugs that block pain) because otherwise, it would be an extraordinarily disturbing and distressing experience. (Heath Affidavit 9:13).[5]

Of great concern is the fact that many complications of the cut-down procedure are well-recognized by the medical community. (Heath Affidavit 9:18). These complications include the very painful and life-threatening conditions of severe hemorrhage (with accompanying sense of asphyxiation and terror), pneumothorax (with accompanying severe distress, sense of suffocation and potential cardiovascular collapse), and cardiac dysrhythmia (abnormal electrical activity of the heart leading to shock with accompanying severe chest pain, nausea, vomiting, and sense of suffocation or asphyxia). (Heath Affidavit 9:18).

Whenever a cut-down procedure is performed in an elective surgical setting, it is imperative that the medical personnel performing the procedure have immediate access to a variety of drugs and medical equipment that includes but is not limited to suction, surgical lighting, surgical instruments, cautery, chest tubes, EKG monitors and equipment, and a defibrillator. (Heath Affidavit 9:18).

The Respondent has not assured the Petitioner that any of the

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5 It should be highlighted that Dr. Sonnier claims that Warden Culliver will only use a local anesthetic during the cut-down procedure Warden Culliver intends to perform on the Petitioner. (See Paragraph 4 of Dr. Sonnier's Affidavit, Attachment 7).

drugs or medical equipment described above will be available during the medical procedure they intend to perform at Holman. Furthermore, the Respondent refuses to supply the Petitioner with any meaningful information concerning the personnel who will be present during the medical procedure to be performed on the Petitioner prior to the legal procedure of his execution by lethal injection.

As Dr. Mark Heath explains, many, if not most, physicians have never personally performed a cut-down procedure and do not possess the requisite skills for competently and safely performing such a procedure. (Heath Affidavit 9:14). Hospitals in the private sector require medical practitioners to be credentialed for the specific procedure of cut-downs for the purpose of safeguarding patients by ensuring that procedures are performed by experienced and competent personnel. (Heath Affidavit 9:15). Subjecting a person to a cut-down procedure in the hands of inexperienced personnel would represent a clear risk of a medical misadventure and botched outcome. (Heath Affidavit 9:16). Any person undergoing a cut-down procedure should be entitled to review the credentials, certification, and training record of the medical personnel who will be performing the procedure. (Heath Affidavit 9:17). In the absence of such a review, and particularly given Warden Culliver's refusal to permit such scrutiny, there is a complete lack of any reasonable assurance that the medical procedure Warden Culliver intends to perform on the Petitioner as

a predicate to his execution will be humane. (Heath Affidavit 9:17).

The cut-down procedure Warden Culliver apparently intends to perform on the Petitioner carries with it a substantial risk of inflicting substantial and prolonged pain and does not comport with evolving standards of decency. The cut-down procedure that Warden Culliver intends to perform on the Petitioner undeniably carries with it the potential for unnecessary mental as well as physical pain and suffering during the execution process. The Respondent is displaying deliberate indifference to known risks of serious harm to the Petitioner in violation of the Eighth Amendment to the United States Constitution. See Estelle v. Gamble, 429 U.S. 97 (1976); and Farmer v. Brennan, 511 U.S. 825 (1994).

As this Court stated in Farmer v. Brennan, 511 U.S. at 845 (citations omitted):

> In a suit such as petitioner's, insofar as it seeks injunctive relief to prevent a substantial risk of serious injury from ripening into actual harm, "the subjective factor, deliberate indifference, should be determined in light of the prison authorities' current attitudes and conduct," their attitudes and conduct at the time suit is brought and persisting thereafter.

It is abundantly clear that the Respondent's attitude has and continues to be one of deliberate indifference to the substantial risks of serious injury to the Petitioner.

According to Dr. Mark Heath, there is an alternative procedure that Warden Culliver could utilize in gaining venous access in the

Petitioner that would easily remedy or mitigate the risks of unnecessary pain and suffering inherent in the cut-down procedure Warden Culliver intends to utilize. (Heath Affidavit 9:20, 21, 22, and 23). This alternative procedure is referred to by several terms, including percutaneous central line placement, percutaneous central access, percutaneous central venous cannulation, and percutaneous technique. (Heath Affidavit 9:23). This procedure has, except in rare circumstances, supplanted the use of the cut-down procedure and is superior to the cut-down procedure in virtually all regards. (Heath Affidavit 9:23). This procedure is less invasive, less painful, faster, cheaper, and safer that the cut-down procedure. (Heath Affidavit 9:23). Additionally, because of this procedure's more widespread use, more physicians are proficient and competent in performing this procedure as compared to the cut-down procedure.

The Respondent has not articulated a reason for implementing the outdated and barbaric cut-down medical procedure (which violates the prohibitions against cruel and unusual punishments) on the Petitioner in lieu of the medical procedure available that meets contemporary standards of medical care (which does not violate the prohibitions against cruel and unusual punishments).

Of great significance and as referenced above, Warden Culliver will not disclose the training or qualifications of the person(s) responsible for performing either the medical procedure on the Petitioner that Warden Culliver has acknowledged must be performed

as a predicate to the legal procedure of execution or the legal procedure of execution by lethal injection. As such, it is unknown to anyone other than the Respondent whether a physician with the appropriate credentials, training, and experience will be present during the requisite medical procedure prior to the execution and/or the legal procedure of execution by lethal injection.

The refusal of the Respondent to identify and describe the medical personnel that will be present during the medical procedure performed on the Petitioner and during the execution itself raises issues of constitutional importance. The Respondent is deliberately preventing the public, the courts, and the condemned prisoners themselves from knowing any meaningful information about the lethal injection protocol and any accompanying medical procedure protocol that the Respondent intends to use in the killing of citizens of the State of Alabama. Independent public scrutiny undeniably plays a significant and indispensable role in the proper functioning of capital punishment. Public disclosure of Alabama's lethal injection protocol and accompanying mandated medical procedures for gaining venous access are critical in allowing the public to determine whether the punishment of execution by lethal injection in the State of Alabama comports with the evolving standards of decency which mark the progress of a maturing society.

For this Court and for the public to determine whether lethal injection execution in the State of Alabama is being humanely

administered in cases where peripheral intravenous access is not possible, the State of Alabama must disclose reliable information about its lethal injection protocol and the mandated medical procedures that will be employed to gain venous access in condemned prisoners. As it stands now, this Court, the public, and the Petitioner are being forced to rely upon the very people responsible for designing and administering the protocol and performing the invasive and risky medical procedures for assurances that the protocol and procedures are sound and that they comport with "the evolving standards of decency". Trop v. Dulles, 356 U.S. 86, 101 (1958).

It should be stressed that there exists a humane method for gaining venous access in the Petitioner that does not violate the Petitioner's rights, but Warden Culliver is adamant that he intends to implement an inhumane method for gaining venous access in the Petitioner that does violate the Petitioner's rights.

Given the fact that Warden Culliver has conceded that the Petitioner's execution will mark the first instance of the State of Alabama having to first perform an invasive medical procedure on a condemned inmate to gain venous access, there exists a substantial risk that the Respondent intends to violate the prohibitions against inflicting cruel and unusual punishments with respect to the Petitioner.

Given the posture that the Respondent has taken regarding the secrecy of the lethal injection protocol and accompanying mandated

medical procedures, this Court cannot be confident that the Respondent is taking all necessary and appropriate steps to minimize the known significant risks of inflicting severe and unnecessary pain and suffering in administering the punishment of lethal injection execution to the Petitioner.

Where, as here, the Petitioner has demonstrated the existence of genuine and realistic concerns about the humaneness of the execution procedure, it is respectfully submitted that this Court cannot, in good conscience, condone the risk of sending the Petitioner to his state sponsored death without first assuring itself that the constitutional prohibitions against the infliction of unnecessary pain in the execution of the death sentence will be honored.

Failure to provide relief will result in irreparable harm in that the Respondent will perform the above-described cut-down procedure on the Petitioner prior to his execution which is scheduled for 6:00 p.m. Central Time on October 9, 2003. Since the Petitioner has been informed that he will be allowed to receive visitors only until 4:00 p.m. on October 9, 2003, the Petitioner believes that the Respondent may perform the medical procedure that violates the Petitioner's rights as guaranteed by the Eighth Amendment as early as 4:01 p.m. Central Time on October 9, 2003.

REASONS FOR GRANTING THE WRIT

This case presents questions of extraordinary importance whether death-sentenced inmates are to be denied the right to bring actions under 42 U.S.C. § 1983 simply because of their sentence. If the decision below is correct, death-sentenced inmates who have filed a federal habeas corpus petition are barred from bringing any § 1983 action that could be brought by other inmates, such as suits based on failure to protect from know risk of harm from other inmates,[6] the malicious and sadistic infliction of harm by prison guards,[7] "unnecessary and wanton infliction of pain,"[8] denial of medical care,[9] or denial of the minimal civilized measure of life's necessities.[10]

The holdings below make this Court the only avenue for a unique and limited set of claims that may arise long after habeas corpus proceedings have ended, such as competence to be executed and some claims - such as deprivation of good conduct time credits - that can *only* be raised in habeas corpus, see Preiser v. Rodriguez, 411 U.S. 475 (1973), and burdening this Court with the duty to engage in fact-finding determinations usually conducted by trial courts

6. See Farmer v. Brennan, 511 U.S. 825 (1994).
7. See Hudson v. McMillian, 503 U.S. 1, 6-7 (1992); Whitley v. Albers, 475 U.S. 312, 320-21 (1986).
8. See Rhodes v. Chapman, 452 U.S. 337, 346 (1981).
9. See Estelle v. Gamble, 429 U.S. 97 (1976).
10. See Palmer v. Johnson, 193 F.3d 346, 353 (5th Cir. 1999).

I. THIS COURT SHOULD RESOLVE A CONFLICT AMONG THE CIRCUITS BY DECIDING WHETHER ALL CLAIMS BROUGHT BY DEATH-SENTENCED INMATES PURSUANT TO 42 U.S.C. § 1983 ARE TO BE TREATED AS SUCCESSIVE HABEAS CORPUS PETITIONS.

This Court should grant certiorari because the Eleventh Circuit and other circuits have misread this Court's decision in Gomez v. United States District Court, 503 U.S. 653 (1992) and Lonchar v. Thomas, 517 U.S. 314 (1996), to hold that any actions brought under 42 U.S.C. § 1983 by a death-sentenced prisoner are to be treated as successive habeas corpus petitions. The Eleventh Circuit has repeatedly held that Gomez and Lonchar "mandate the conclusion that 'a § 1983 claim is subject to the procedural requirements for bringing a second or successive habeas claim.'" Spivey v. Board of Pardons and Paroles, 279 F.3d 1301, 1302 (11th Cir. 2002) (quoting Felker v. Turpin, 101 F.3d 95, 96 (11th Cir. 1996)).

Despite the fact that § 1983 cases do not challenge the conviction or sentence, the Eleventh Circuit has applied Gomez to find that any claim raised in a § 1983 action "necessarily implies a challenge to the imposition of his sentence." Spivey, 279 F.3d at 1302 n. 1 (finding that challenge to propriety of clemency proceedings implied a challenge to his sentence); see also Felker v. Turpin, 101 F.3d 95, 96 (11th Cir. 1996) (finding challenge to means of execution to be the "functional equivalent" of a second habeas corpus petition).

However, Gomez, a three-paragraph *per curiam* decision decided in a few hours on an application to vacate a stay of execution issued by the Ninth Circuit, did not hold that all § 1983 claims brought by death-sentenced inmates were to be treated as successive habeas petitions, but that because the inmate there sought an equitable remedy, equity must take into account all of the relevant factors, including the State's interest proceeding with its judgment. Gomez involved a plaintiff who had filed four federal petitions for habeas corpus, some that same night, and who raised a claim within hours of his execution that could have been raised ten years earlier. Id. at 653-54. This case, in contrast, involves an inmate who has filed only one habeas corpus petition concerning his current sentence, and who raises a claim that only arose recently.

In addition, Gomez was decided in 1992 before passage of the Antiterrorism and Effective Death Penalty Act, which drastically restricted claims that could be brought in successor petitions to those that involved a constitutional violation that established innocence. Gomez held that in the unique circumstances presented there, the equitable principles then in existence with regard to abuse of the writ should be applied. However, this Court has never held that the drastic statutory restrictions contained in 28 U.S.C. 2244(b) apply to 1983 actions, and apply only to 1983 actions brought by death-sentenced inmates, not other inmates who have previously litigated habeas corpus claims. There is no basis for

such a distinction. Indeed, this Court held in Lonchar v. Thomas that courts are not to abandon the normal "statutes, rules, precedents and practices" in capital cases, but to adhere to them.

The Eleventh Circuit had earlier found that a challenge to the means of execution was properly brought under § 1983, see Sullivan v. Dugger, 721 F2d 729 (11th Cir. 1983) ("Petitioner does not challenge the fact or nature of his sentence or the state's right to execute him thus distinguishing this § 1983 action from one brought under 28 U.S.C. § 2254 (habeas corpus)."), as had a district court within the Eleventh Circuit. See Jones v. McAndrew, 996 F. Supp. 1439, 1443-1447 (N.D. Fla. 1998). In Jones, the district court, observing that the challenge to the procedures for putting someone to death was "not analytically different from cases brought under § 1983 every day," concluded that "[u]nless the court is to adopt a results-oriented approach to litigation involving the death penalty, the same general principles that apply generally to habeas petitions and § 1983 actions must be followed here." Id. at 1444. Similarly, the Ninth Circuit, in concluding that a challenge to the method of execution was properly brought as a § 1983 action stated: "To hold otherwise would carve out of habeas and § 1983 law a separate jurisprudence for death penalty cases. There is no authority for such a dichotomy." Fierro v. Gomez, 77 F.3d 301, 304 (9th Cir. 1996).

The Eleventh Circuit, however, has now adopted exactly such an approach. In Felker v. Turpin, the court said that it declined to

follow its own precedent in Sullivan because of this Court's decision in Gomez. See Felker v. Turpin, 101 F.3d at 96 n. 1. Some other circuits have adopted the same approach. See, e.g., Beets v. Texas Board of Pardons and Paroles, 205 F.3d 192, 193 (5th Cir. 2000) (holding challenges to clemency proceeding must be pursued by writ of habeas corpus); McQueen v. Patton, 118 F.2d 460 (1997) (explicitly following the Eleventh Circuit in treating 1983 case about method of execution as a successive petition);

However, this Court considered a challenge to clemency proceedings in a § 1983 action in Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998). The Ninth Circuit held that a challenge to the method of execution was properly brought pursuant to § 1983 in Fierro v. Gomez, 77 F.3d at 303-306 and other circuits have considered § 1983 actions by death-sentenced inmates without treating them as habeas corpus actions. See, e.g., Young v. Hayes, 218 F.3d 850 (8th Cir. 2000) (action regarding interference by a state official in clemency proceedings properly brought as § 1983 action); Wilson v. United States District Court for the Northern District of California, 161 F.3d 1185 (9th Cir. 1998) (denying motion to vacate temporary restraining order granted by district court to hear § 1983 action regarding clemency proceedings); Duvall v. Keating, 162 F.3d 1058 (10th Cir. 1998) (considering § 1983 action regarding clemency procedures); Otey v. Hopkins, 5 F.3d 1185 (8th Cir. 1993) (same).[11] See also Dotson v. Wilkinson, 300

11. See also Booker v. Murphy, 953 F. Supp. 756 (S.D. Miss. 1997)

F.3d 661 (6th Cir. 2002) (finding prisoner's § 1983 action was improperly dismissed where it was challenging procedures used by state prison officials, which would not affect the duration of his sentence of validity of his conviction).

The Eleventh Circuit has suggested that such claims can be brought in original habeas petitions to this Court or in certiorari review of state court proceedings. But as Judge Barkett pointed out dissenting in Spivey v. Board of Pardons and Paroles:

> [I]n view of the demands of the Supreme Court's caseload and the discretionary nature of the Court's review, neither of these alternatives provides a regular and reliable avenue for hearing such claims. Moreover, it makes no sense to deprive a prisoner of review in the federal district and appellate courts simply because the basis emerged after an initial habeas petition was filed, when otherwise such review would clearly be available.

279 F.3d at 1305 n. 3. Determination of these actions also requires evidentiary development, something in which this Court does not engage.

The Court should grant certiorari in this case to decide this important question which has divided the circuit courts of appeal.

(considering challenge to lethal gas in 1983 action).

II. **THE CUT-DOWN MEDICAL PROCEDURE THAT THE RESPONDENTS INTEND TO PERFORM ON THE PETITIONER AS A PREDICATE TO THE LEGAL PROCEDURE OF EXECUTION BY LETHAL INJECTION UNDOUBTEDLY CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT PROSCRIBED BY THE EIGHTH AMENDMENT.**

This Court clearly set forth the standard of review for a claim of an Eighth Amendment violation of this nature in Estelle v. Gamble, 429 U.S. 97 (1976). In Gamble, this Court plainly stated:

> We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain," proscribed by the Eighth Amendment.

Id. at 104 (citations omitted). This Court further opined:

> In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend "evolving standards of decency" in violation of the Eighth Amendment.

Id. at 106.

This Court in Farmer v. Brennan, 511 U.S. 825 (1994) expanded upon its ruling in Gamble and defined "deliberate indifference". Specifically, this Court stated:

> A prison official's "deliberate indifference" to a substantial risk of serious harm to an inmate violates the Eighth Amendment. [citations omitted]. This case requires us to define the term "deliberate indifference," as we do by requiring a showing that the official was subjectively aware of the risk.

Id. at 828-829. The Court further held:

> We hold instead that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety, the official must both be aware of facts from which the inference

> could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.

Id. at 837.

Undoubtedly, the Respondents are displaying "deliberate indifference" to the Petitioner's "serious medical needs" and their deliberate indifference will result in the "unnecessary and wanton infliction of pain" proscribed by the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97, 104 (1976). Furthermore, the Respondents have repeatedly been made aware of and have disregarded the substantial risk of serious harm to the Petitioner if they perform the medical procedure they have outlined that they will perform as a predicate to performing the legal procedure of execution. The Respondents' indifference to this risk undeniably offends the evolving standards of decency in violation of the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97, 106 (1976).

Specifically, the Respondents intend to perform the barbaric method of a cut-down procedure to gain venous access in the Petitioner as a predicate to the legal procedure of execution which will involve making a series of surgical incisions through the Petitioner's skin, through the underlying connective tissue, through the underlying layers of fat, through the underlying layers of muscle, until the region surrounding a large vein is reached. (Heath Affidavit 1:9). The Respondents have asserted that they may opt to perform this cut-down in the Petitioner's arm despite the fact that it is unlikely that the Respondents will be able to

gain access to any veins in the Petitioner's arms and despite the fact that the procedure will be challenging, painful, and most likely ultimately unsuccessful. (Heath Affidavit 2:13). The Respondents with complete and deliberate indifference intend to perform this procedure despite the known substantial and extremely painful risks of severe hemorrhage (with accompanying sense of asphyxiation and terror), pneumothorax (with accompanying sever distress, sense of suffocation and potential cardiovascular collapse), and cardiac dysrhythmia (which can lead to shock with accompanying severe chest pain, nausea, vomiting, and sense of suffocation or asphyxia). (Heath Affidavit 1:18). Furthermore, the Respondents intend to perform this surgical exploration under only a local anesthetic despite the fact that, in the rare instances in modern day medicine of a cut-down procedure being performed, cut-down procedures are usually performed under deep sedation due to the fact that it is an extraordinarily disturbing and distressing experience. (Heath Affidavit:13). As the United States District Court for the Middle District of Alabama noted in its opinion, the Respondents "have offered no explanation as to why they intend to use a cut-down procedure instead of a percutaneous central line placement" which is the medical procedure that meets contemporary medical care standards and which has, except in rare circumstances, supplanted the use of the cut-down procedure due to the fact that it is less invasive, less painful, faster, and safer. (Attachment 10 at pages 5-6)(Heath Affidavit 1:23).

Furthermore, the Respondents intend to perform this medical procedure that does not comport with contemporary medical standards without having access to a variety of drugs and medical equipment necessary that should be readily available in case of a mishap. (Heath Affidavit:18,22). The Respondents also are unwilling to guarantee that a physician with the appropriate credentials, training, and experience will be the one performing this risky medical procedure.

As Dr. Mark Heath opined, "Given the near universal adoption of superior techniques, there is no comprehensible reason for the State of Alabama to be planning to employ the cut-down procedure to obtain intravenous access, unless there exists an intent to render the procedure more painful and risky than it otherwise needs to be." (Heath Affidavit 1:21).

It is respectfully submitted that the cut-down procedure which the Respondents intend to utilize prior to the Petitioner's execution violates this Court's precedent under the Eighth Amendment. This Court should follow that precedent and should not allow the cut-down procedure to be conducted on the Petitioner.

CONCLUSION

For the foregoing reasons, Mr. Nelson respectfully asks that this Court issue a writ of certiorari to review the decision below.

Respectfully submitted,

MICHAEL KENNEDY McINTYRE
Georgia Bar No. 494075
Attorney for Petitioner

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Atlanta, Georgia 30303
Telephone (404) 688-0900
Fax No. (404) 525-4609

H. VICTORIA SMITH
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Attorney for Petitioner

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a true and correct copy of this Petition for Writ of Certiorari by facsimile transmittal to the following:

Mr. Michael B. Billingsley
Assistant Attorney General
11 South Union Street
Montgomery, Alabama 36130
Fax No. (334) 242-2848

Dated: This ____ day of October, 2003.

Michael Kennedy McIntyre

ATTACHMENT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

DAVID LARRY NELSON, Plaintiff,	)	
v.	)	Case No. _____
DONAL CAMPBELL, Commissioner of the Alabama Department of Corrections, GRANTT CULLIVER, Warden of Holman Correctional Facility.	)	

AFFIDAVIT OF WARDEN GRANTT CULLIVER

I, Grantt Culliver, do solemnly swear to the following facts:

1. I am presently employed with the Alabama Department of Corrections as Warden of the Holman Correctional Facility. I have been employed in that capacity since August 2002. Before I became Warden at Holman, I was Warden at Fountain Correctional Facility.

2. Seven to ten days before receiving the execution warrant on September 3, 2003, I spoke on the telephone with Victoria Smith, who told me she was David Nelson's legal counsel. Ms. Smith said that Nelson's vein structure was poor in his lower arms and hands due to intravenous drug use. Ms. Smith brought up the possibility of whether

Nelson could be electrocuted because she believed it would be difficult to find a vein for the purpose of carrying out the execution by lethal injection. I told Ms. Smith that according to state law it was too late for Nelson to select the option of being electrocuted.

2. Because these concerns were expressed to me, I had a registered nurse examine Nelson around September 10 to see whether a vein could be found on his lower arms and hands to administer the lethal injection. The nurse reported to me that Nelson did not have any veins in his lower arms and hands sufficient to support a direct intravenous line.

3. Approximately three weeks ago, a second nurse examined Nelson in my presence. Nelson knew this nurse from Donaldson and reminded her that the medical personnel at the Donaldson Correctional Facility were unable to draw blood from Nelson's lower arms and hands because of his intravenous drug use. Nelson raised his pants leg to remind her of the location where the medical personnel took blood from him.

4 Because of the above-described facts, I have recently been in contact with a physician who resides in

Alabama who has agreed to perform any procedures necessary to connect a direct intravenous line. The doctor has told me that he will first attempt to connect a direct intravenous line to the femoral vein located in the thigh. If this procedure is unsuccessful, the doctor will attempt to attach a direct intravenous line to the external carotid vein located in the neck. The doctor told me that he has performed these procedures hundreds of times. The last procedure that the doctor will attempt, should it become necessary, will be to make a 2 inch incision in Nelson's upper arm for the purpose of locating a peripheral vein to perform a central line procedure. The doctor told me that this last procedure involves the administration of a local anesthetic.

5. Neither Nelson nor his lawyers have ever requested that a physician be admitted into Holman to perform an examination of Nelson.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on October 6, 2003, in Montgomery, Alabama.

Grantt Culliver

Sworn and subscribed before me this the 6th day of Ocotber, 2003.

Notary Public

Notary Public, AL State at Large
My commission expires 10/16/04.

ATTACHMENT 2

DON SIEGELMAN
GOVERNOR

STATE OF ALABAMA
DEPARTMENT OF CORRECTIONS

MICHAEL W. HALEY
COMMISSIONER

April 27, 2001

H. Victoria Smith, Esq.
507 The Grant Building
44 Broad Street, N.W.
Atlanta, GA 30303

Re: David Larry Nelson
AIS #Z-383

Dear Ms. Smith:

This will acknowledge receipt of your FAX of April 26, 2001, and further advise that I have informed Deputies Attorney General Clay Crenshaw and Michael Billingsley of your request. Pursuant to their instruction, we will require a court order to release these records.

If you have any further questions, would you please refer them to Messrs. Crenshaw and Billingsley.

Sincerely,

William F. Addison
Assistant General Counsel

WFA/eln

cc: Clay Crenshaw
Michael Billingsley

ATTACHMENT 3

LAW OFFICE OF
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H. VICTORIA SMITH
LICENSED IN GA AND SC
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August 19, 2003

Warden Grantt Culliver
Holman Correctional Facility
9677 Highway 21 N
Atmore, Alabama 36503

Re: David Larry Nelson, Z-383

Dear Warden Culliver:

Thank you for speaking with me today via telephone regarding Mr. Nelson's pending execution. As I stated during that telephone conversation, I am trying to learn as much as possible about the lethal injection procedures currently in use at your facility so that I may knowledgeably consult with Mr. Nelson regarding his upcoming execution. As we discussed, Mr. Nelson has great concerns about the lethal injection procedure due to the fact that he has severely compromised veins.

Based on our telephone conversation, it is my understanding that you have a written protocol regarding execution procedures but are unwilling to provide that protocol to me. Also, you assured me that there will be "medical personnel" present during Mr. Nelson's execution, but you would not divulge any descriptions of the "medical personnel" (e.g., an anesthesiologist, a general practice physician, a registered nurse). You indicated that the "medical personnel" would have received "medical training"; however, you would not tell me anything about that training except that it was "medical" in nature. You would not divulge whether that training included instruction in execution methodology. Finally, you could not tell me anything about the "cutdown" procedure that would have to be implemented if the "medical personnel" could not find good veins on Mr. Nelson's arms.

You did agree to have Mr. Nelson evaluated by a physician once Mr. Nelson was transferred to your facility so that the physician could consult with Mr. Nelson about the difficulties that Mr. Nelson might encounter during the execution, and I thank you for agreeing to do so. As I told you, I am sure that such a consultation would alleviate some of the anxiety that Mr. Nelson is currently experiencing regarding the execution. I am assuming that the physician who examines Mr. Nelson will be allowed to review the protocol for the execution procedure so that he or she may speak intelligently about the procedure with Mr. Nelson.

Please contact me if anything in this correspondence is inaccurate. Thank you again for speaking with me.

Sincerely,

H. Victoria Smith

ATTACHMENT 4

AL ST § 15-18-81
Ala.Code 1975 § 15-18-81

CODE OF ALABAMA
TITLE 15. CRIMINAL PROCEDURE.
CHAPTER 18. SENTENCE AND PUNISHMENT.
ARTICLE 5. DEATH PENALTY.

§ 15-18-81. Confinement until execution; certain persons may visit condemned person.

Upon the receipt of a condemned person by the warden of Holman prison, he shall be confined therein until the time for his execution arrives; and, while so confined, all persons outside the said prison shall be denied access to him, except his physician and lawyer, who shall be admitted to see him when necessary to his health or for the transaction of business, and the relatives, friends and spiritual advisors of the condemned person, who shall be admitted to see and converse with him at all proper times, under such reasonable rules and regulations as may be made by the Board of Corrections.

(Acts 1923, No. 587, p. 759; Code 1923, § 5313; Code 1940, T. 15, § 347; Acts 1971, No. 2360, p. 3792.)

<General Materials (GM) - References, Annotations, or Tables>

HISTORY

Code Commissioner's Notes

Acts 1979, No. 79-426, p. 667, effective October 1, 1979, abolished the Board of Corrections and vested all its rights, duties, power, property, etc., in the Governor, and authorized him to exercise such functions and duties himself or through designated administrators. See §§ 14-1-15 through 14-1-17, and also Acts 1979, No. 79-154, p. 253.

Ala. Code 1975 § 15-18-81, AL ST § 15-18-81

Current through End of 2003 Organizational Session

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END OF DOCUMENT

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ATTACHMENT 5

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H. VICTORIA SMITH
LICENSED IN GA AND SC
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October 3, 2003

VIA FACSIMILE TRANSMITTAL

Mr. Andy Redd
Alabama Department of Corrections Legal Department
101 South Union Street
Montgomery, Alabama 36130
Fax No. (334) 353-3891

Re: Alabama Lethal Injection Protocol

Dear Mr. Redd:

Pursuant to our telephone conversation earlier today, please accept this correspondence as my formal request that I be provided with a copy of Alabama's lethal injection protocol. As we discussed, I represent Mr. David Larry Nelson, Z-383, who is scheduled to be executed by lethal injection by the State of Alabama on Thursday, October 9, 2003. Due to years of intravenous drug abuse, Mr. Nelson has severely compromised veins and is concerned about the procedure that the protocol dictates should be implemented in gaining venous access.

If you have any questions about this correspondence or my request, please contact me. Thank you for your assistance in this matter.

Sincerely,

H. Victoria Smith

ATTACHMENT 6

Original Message:

From: Redd, Andrew W ARedd@doc.state.al.us
Date: Fri, 3 Oct 2003 13:52:01 -0500
To: hvs@michaelkennedymcintyre.com
Subject: Request for Lethal Injection Protoco/David Larry Nelson Z-383

Dear Ms. Smith:

I have received and reviewed your request for a copy of the lethal injection protocol and have conferred with my superiors on this matter. I must inform you that we must deny your request.

Andy Redd
General Counsel

mail2web - Check your email from the web at http://mail2web.com/ .

ATTACHMENT 7

DAVID LARRY NELSON,

Plaintiff,

v.

STATE OF ALABAMA,

Defendant.

Case No. _____

AFFIDAVIT OF DR. MARC SONNIER

I, Marc Sonnier, do solemnly swear to the following facts:

1. I am a medical doctor employed by Naphcare, a company currently under contract to provide health care for the State of Alabama prison system. I received a Bachelor of Science degree in biology from the University of South Alabama in 1975 and a medical degree, also from the University of South Alabama, in 1981. I have worked in my current position for more than a year. I have been asked to describe and comment on several procedures medical personnel can undertake to locate a vein, for the purposes of drawing blood or setting up an IV line, from an individual who has compromised veins due to extensive intravenous drug use.

2. It is my understanding that the first procedure to be attempted will be to locate and attach the IV to the femoral vein located in the upper thigh. This is a routine procedure that I have conducted approximately 80 to 100 times in the past for the purpose of drawing blood from an individual with no superficial veins. Based on my knowledge, experience, and observations of the patients during the procedure, it is my opinion that it causes minimal pain similar to that experienced from a needle stick in the arm. In all the times I have conducted the procedure, I have been unable to successfully locate the vein approximately 8 to 10 times. In each of those instances, however, the failure can be attributed to the fact that the patient was obese.

3. I have been told that the second procedure to be attempted is to attach the intravenous line to the external carotid vein located in the neck. I have done this procedure 8-10 times. The external carotid vein provides access to an IV line and is actually a bigger caliper vessel than the ones in the lower arms and hands. The pain involved with this procedure would be no worse than if someone were attaching an IV to the wrist or arm.

4. It is my understanding that the next procedure to be attempted, if necessary is to perform a "cut-down" procedure by making a two inch incision in the antecubital fossa located in the front part of the arm in the bend of the elbow. The procedure involved here is to isolate and dissect the saphenous vein that is relatively easily accessible just beneath the skin. This is a procedure that I have employed 8-10 times. The procedure itself is painless because a local anesthetic is used.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on October 11, 2003. in ,Alabama.

Marc Sonnier

Sworn and subscribed before me this the 7 day of ~~September,~~ October 2003.

Notary Public

From: 334-353-8400 To: 8140452546O9 Page: 18/28 Date: 10/7/2003 12:28:10 PM

ATTACHMENT 8

AFFIDAVIT OF MARK HEATH, M.D.

STATE OF NEW YORK)

COUNTY OF NEW YORK)

My name is Mark Heath, M.D., and I have previously submitted an Affidavit regarding Mr. David Nelson's execution.

1.

I have reviewed two affidavits faxed to me at 2:19 PM Eastern Time on October 7, 2003 by Mr. Nelson's attorneys.

2.

The affidavit of Grantt Culliver quotes a registered nurse's finding that David Nelson does "not have any veins in his lower arms and hands sufficient to support a direct intravenous line".

3.

Based on David Nelson's history of intravenous drug abuse (IVDA) and the established lack of visible peripheral veins, it is highly likely that the personnel staffing his execution will be required to place a central line in either the femoral vein (in the groin), the subclavian vein (behind the clavicle or collar bone), or in one of the jugular veins (in the neck) - - the internal or external jugular vein.

4.

The affidavit of Grantt Culliver states that "the doctor will attempt to attach a direct intravenous line to the external carotid vein located in the neck".

5.

The "external carotid vein" does not exist in human beings.

6.

The term "external carotid vein" is not listed in Stedman's Medical Dictionary and it is not listed in Dorland's Medical Dictionary.

7.

Dr. Ernest April, Associate Professor of Anatomy at Columbia University in New York City and Course Director of the Gross Anatomy Course at the Columbia College of Physicians and Surgeons, has never heard of the term "external carotid vein." (Personal Communication at 2:45 P.M.).

8.

It can be speculated that Mr. Culliver intended to refer to the "external jugular vein", a commonly-used structure for obtaining intravenous access if peripheral access can not be secured.

9.

I note that Mr. Culliver's affidavit preceded the Affidavit of Dr. Marc Sonnier by one day.

10.

Dr. Sonnier in his affidavit states that he has been instructed that, if necessary, he should place a catheter in the "external carotid vein" of Mr. Nelson for the purpose of performing lethal injection. Dr. Sonnier uses the term "external carotid vein" twice in the same paragraph, and states that he has employed this procedure "8 - 10 times" (in his 22 years since graduating from medical school).

11.

Dr. Sonnier's repeated use of the term "external carotid vein", combined with his recitation of his "understanding" of the order of procedures to be attempted, raises in my mind the concern that he lacks currency and proficiency with the advanced techniques of intravenous access that almost certainly will be necessary for the conduct of Mr. Nelson's execution.

12.

The use of the term "external carotid vein" by both Mr. Culliver and Dr. Sonnier can not be coincidental. It raises in my mind the concern that Dr. Sonnier is acting under instruction from Mr. Culliver, and that these instructions include specification of technical medical issues that are likely to beyond the professional training and credentialing of Mr. Culliver.

13.

A further concern is that Dr. Sonnier states that he might perform a cut-down procedure on David Nelson's arm. It is highly likely that, due to Mr. Nelson's history of intravenous drug abuse, the deep and superficial veins of his arm will be scarred and/or thrombosed (occluded by clot), thereby rendering a cut-down procedure in the arm ineffective. Surgical exploration of Mr. Nelson's arm is likely to be technically challenging and painful. Dr. Sonnier's stated experience with cut-downs is "8 - 10 times" over the entirety of his medical career. It needs to be determined whether Dr. Sonnier has been credentialed by his employer, Naphcare, or by any hospital in Alabama, to perform this surgical procedure. A prior experience of "8 - 10 times" is not sufficient for contemplating surgical exploration of the arm of an intravenous drug abuser with known compromise of subcutaneous veins.

14.

It is difficult for me to understand why the State of Alabama would not want to recruit a well-trained, highly proficient, currently credentialed surgeon to supervise and/or perform the procedures required for establishing intravenous access. This level of expertise is clearly warranted by the recognized condition of Mr. Nelson's peripheral veins.

I declare under the penalty of perjury that the foregoing is true and correct.

MARK HEATH, M.D.

ATTACHMENT 9

AFFIDAVIT OF MARK HEATH, M.D.

STATE OF NEW YORK)

COUNTY OF NEW YORK)

Personally appeared before me, Mark Heath, M.D., who, after first being duly sworn stated and affirmed under oath as follows:

1.

My name is Mark Heath, M.D., and I am more than eighteen years of age, sui juris, and am competent to give this Affidavit as I have personal knowledge of certain facts relative to the State of Alabama's planned execution of Mr. David Nelson.

2.

I am a physician licensed to practice medicine in the State of New York.

3.

I am a practicing anesthesiologist and am Board Certified in anesthesiology. I am an assistant professor of clinical anesthesiology at Columbia University College of Physicians and Surgeons, and teach I instruct medical students and residents and fellows in the practice of anesthesiology. My routine practice includes obtaining intravenous access in virtually all of my patients. Additionally, the majority of my patients require the placement of central venous catheters, and I personally supervise or perform the placement of these catheters. I conduct research in the field of anesthesiology sponsored by the National Institutes of Health and publish in the field of anesthesiology. My curriculum vitae is attached to this Affidavit.

4.

I was contacted by Mr. David Nelson's attorneys regarding their concerns about Mr. Nelson's severely compromised veins and their concern that the State of Alabama's execution team might encounter problems in attempting to gain venous access with Mr. Nelson during the lethal injection execution process.

5.

It is my understanding that gaining peripheral venous access to Mr. Nelson has been difficult during medical procedures conducted on Mr. Nelson in the past by prison personnel.

6.

It is my understanding that the warden who will be in charge of the execution at Mr. Nelson's prison has acknowledged to Mr. Nelson's attorneys that Mr. Nelson's compromised veins will present a novel situation for the State of Alabama's execution team in gaining venous access and will require that team for the first time to conduct a separate medical procedure prior to the execution.

7.

It is my understanding that both the warden of Mr. Nelson's prison and the Alabama Department of Corrections have refused to provide Alabama's written protocol for lethal injection executions to Mr. Nelson or his attorneys. As such, it is unknown by anyone other than those State of Alabama employees authorized to be in possession of the written protocol what procedures, if any, the protocol directs medical personnel to follow upon being presented with a condemned person such as Mr. Nelson with whom peripheral intravenous access is not possible.

8.

It is my understanding that the warden at Mr. Nelson's prison intends to gain venous access immediately preceding the execution by making a surgical incision of approximately two inches in length either in Mr. Nelson's leg or on his arm and inserting a catheter into one Mr. Nelson's veins through that incision. This procedure is known as a cut-down procedure.

9.

A cut-down procedure involves making a series of surgical incisions though the skin, through the underlying connective tissue, through the underlying layers of fat, through the underlying layers of muscle, until the region surrounding a large vein is reached.

10.

A cut-down procedure can be performed on the arm or leg, or in the groin, neck, or chest. Patients who have been exposed to chronic intravenous chemicals, whether chemotherapy or drugs of abuse, often have severe scarring of the veins in the arms and legs, and cut-downs have to be performed in the neck, chest, or groin.

11.

During the procedure multiple small arteries and veins in the fat and muscle layers are transected and release blood; these blood vessels need to be closed either by the use of cautery or the use of ligatory suture. Tissue needs to be dissected away from the vein, usually using a technique called blunt dissection.

12.

If cautery is used, smoke will rise from the area of the incision and the room will smell of burning tissue, flesh, and blood. Cautery also makes a buzzing and sizzling sound as the water in the blood and tissue boils.

13.

When performed electively, which is quite uncommon (see below), cut-down procedures are usually performed under deep sedation that includes the administration of potent intravenous analgesics (drugs that block pain), because it would otherwise be an extraordinarily disturbing and distressing experience.

14.

A cut-down procedure is a surgical procedure that should be performed only by a physician or practitioner who is specifically trained and credentialed to perform that procedure. Many, or perhaps most, physicians have never personally performed a cut-down procedure. In particular, physicians who have not received postgraduate training in surgery or cardiology or emergency medicine are unlikely to be experienced and proficient in performing this procedure. Therefore, merely stating that a physician will be present at the execution fails to provide any assurance to the condemned prisoner that the procedure will be performed safely and competently.

15.

In the hospital setting medical practitioners are credentialed for specific procedures, including cut-down procedures. This system has been instituted to safeguard patients by ensuring that procedures are performed by experienced and competent personnel.

16.

Regardless of their status in society, no individual should be subjected to a surgical procedure such as a cut-down at the hands of an inexperienced practitioner. Any plan that involves subjecting any person to a cut-down procedure in the hands of inexperienced personnel would represent a clear risk of a medical misadventure and a botched outcome.

17.

Any patient or person undergoing an elective cut-down procedure should be entitled to review the credentials, certification, and training record of the person or persons who will be performing the procedure. In the absence of such a review, and in particular in the presence of a refusal to permit such scrutiny, there is a complete lack of any reasonable assurance that the procedure will be humane.

18.

Complications of the cut-down procedure are well-recognized and are described in basic clinical textbooks. These complications include:

(a) Severe hemorrhage (bleeding) - the cut-down procedure involves a deep incision and dissection in the area of large blood vessels. Laceration of these blood vessels may result in bleeding that can obscure the surgical field and make surgical repair difficult. The likelihood of this occurring is increased if the proper equipment is not available. This equipment would include suction, surgical lighting, surgical instruments, and cautery. In the hospital setting a physician is able to quickly summon assistance should a hemorrhagic complication situation arise. There has been no assurance for Mr. Nelson that experienced and competent assistance will be readily available to treat the complication of severe hemorrhage. Death by hemorrhage and exsanguination (the emptying of blood from the body) is extremely distressing. It is accompanied by a sense of asphyxiation and terror, and would be inhumane were it to occur as the result of a deliberate and premeditated act.

(b) Pneumothorax – a cut-down procedure, when used to obtain access to the internal jugular vein (in the neck) or the subclavian vein (behind the collar bone), can cause a complication called pneumothorax. This complication involves the entry of air into the potential space between the lungs and the inner wall of the chest. This complication causes severe distress, including the sensation of suffocation, and if untreated often results in death by asphyxia and cardiovascular collapse. Death by pneumothorax would be agonizing and, if caused by a deliberate and premeditated act, would be inhumane. The treatment of pneumothorax involves the placement of a tube called a "chest tube", which when connected to a source of suction serves to evacuate the air from the space between the lung and the chest wall. Placement of a chest tube requires training and experience. It is likely that the majority of physicians, particularly those who have not completed post graduate surgical training, have never placed a chest tube. Placement of a chest tube also

requires the immediate availability of the proper medical equipment and supplies, and the availability of a source of suction.

(c) Cardiac dysrhythmia - a cut-down procedure, when used to obtain access to the internal jugular vein (in the neck) or the subclavian vein (behind the collar bone), can cause a complication called cardiac dysrhythmia. This is an abnormality of the electrical activity of the heart which can cause impaired pumping of blood and hemodynamic collapse (also called shock). The cut-down procedure causes this complication because the tip of the catheter can irritate the atrium or ventricle, the chambers of the heart, and trigger abnormal electrical activity. Recognition of this common complication requires the placement of EKG leads prior to performing the procedure, and requires frequent checking of the EKG trace while the catheter is being advanced. Treatment of life threatening dysrhythmias requires the use of the appropriate drugs and/or the use of electrical shocks from a device called a defibrillator. Failure to prepare for the diagnosis and treatment of the complication of dysrhythmia would place a patient, or anybody undergoing a cut-down procedure in the internal jugular vein or the subclavian vein, at risk of experiencing hemodynamic collapse. This is a terrifying experience that is often accompanied by severe chest pain, nausea, vomiting, and a sense of suffocation or asphyxia.

(d) Pain. – because of the invasive nature of the procedure, including blunt and sharp dissection through successive layers of skin, fat, and muscle, a cut-down procedure can be extremely painful. The risk of pain is greatly increased if the procedure is performed by personnel who are not well-experienced in surgical techniques.

19.

The obtaining of central venous access is commonly performed in therapeutic settings throughout the United States and the world.

20.

The cut-down technique is rarely used in the elective surgical setting because it has been supplanted by superior techniques that are safer, less painful, less invasive, faster, cheaper, and

easier to perform. In the elective setting, the cut-down technique is now almost exclusively reserved for the placement of cardiac pacemakers and for harvesting veins for coronary surgery. Elective cut-down procedures are performed in fully equipped operating rooms or catheterization labs under deep sedation or general anesthesia.

21.

Given the near universal adoption of superior techniques, there is no comprehensible reason for the State of Alabama to be planning to employ the cut-down procedure to obtain intravenous access, unless there exists an intent to render the procedure more painful and risky than it otherwise needs to be.

22.

Given the above-described risks involved with performing a cut-down procedure in an attempt to gain venous access in a patient with whom peripheral intravenous access attempts have failed, such a procedure does not comport with the contemporary practice of medical care and is highly unlikely to be selected and performed by a physician practicing in a therapeutic health care setting.

23.

The contemporary practice of medicine usually employs a hollow needle and a wire to secure central intravenous access. This technique is referred to by several terms, including but not limited to "percutaneous central line placement", "percutaneous central access", "percutaneous central venous cannulation", and "percutaneous technique". This technique has, except in rare circumstances, supplanted the use of the cut-down technique. The percutaneous technique is superior to the cut-down technique in virtually all regards. Compared with the cut-down technique, the percutaneous technique is less invasive, less painful, faster, cheaper, and safer. Because of its more widespread use, far more physicians and health care professionals are proficient and competent in performing the percutaneous technique. It would be extraordinarily rare to perform a

central venous cut-down procedure without first attempting, and failing, to successfully obtain intravenous access using the percutaneous technique. In experienced hands the failure rate using the percutaneous technique is extremely low.

24.

Gaining venous access is a medical procedure that is separate from the legal procedure of execution by lethal injection. The State of Alabama's protocol regarding venous access procedures, therefore, should comport with contemporary standards of medical care. To meet contemporary standards of medical care, the protocol should not include a cut-down procedure.

25.

For the reasons described above, in order to approach or meet a medically acceptable standard the execution protocol should explicitly articulate and define the requisite credentials, licensure, training, and experience of the personnel who are scheduled to secure intravenous access. While such definition should apply to all lethal injection procedures, it should in particular apply to lethal injection procedures in which the establishment of intravenous access is expected and foreseen to be challenging and painful.

SO SAYETH AFFIANT.

MARK HEATH

Sworn to and subscribed before me
This 6th day of October, 2003
Lia Pascale
Notary Public
My commission expires: 7/21/07

LIA PASCALE
Notary Public, State of New York
No. 01PA6015971
Qualified in New York County
Commission Expires 7/21/07

Curriculum Vitae

1) Date of preparation: October 6, 2003

2) Name: Mark J. S. Heath

Birth date: March 28, 1960
Birthplace: New York, NY
Citizenship: United States, United Kingdom

3) Academic Training:

	Harvard University	B.A., Biology, 1983
	University of North Carolina, Chapel Hill	M.D., 1987
	Medical License	New York: 177101-1

4) Traineeship:

1987 – 1988 Internship, Internal Medicine, George Washington University Hospital, Washington, DC.

1988 – 1991 Residency, Anesthesiology, Columbia College of Physicians and Surgeons, New York, NY

1991 – 1993 Fellowship, Anesthesiology, Columbia College of Physicians and Surgeons, New York, NY

5) Board Qualification:

Diplomate, American Board of Anesthesiology, October 1991.

6) Military Service: None

7) Professional Organizations:

American Society of Anesthesiologists
International Anesthesia Research Society
Society of Cardiovascular Anesthesiology

8) Academic Appointments:

1993 – 2002	Assistant Professor of Anesthesiology, Columbia University, New York, NY
2002 - present	Assistant Professor of Clinical Anesthesiology, Columbia University, New York, NY

9) Hospital/Clinical Appointments:

1993 – present Assistant Attending Anesthesiologist, Presbyterian Hospital, New York, NY.

10) Honors:

Magna cum laude, Harvard University
Alpha Omega Alpha, University of North Carolina at Chapel Hill
First Prize, New York State Society of Anesthesiologists Resident Presentations, 1991

11) Fellowship and Grant Support:

Foundation for Anesthesia Education and Research, Research Starter Grant Award, Principal Investigator, funding 7/92 - 7/93, $15,000.

Foundation for Anesthesia Education and Research Young Investigator Award, Principal Investigator, funding 7/93 - 7/96, $70,000.

NiH KO8 "Inducible knockout of the NK1 receptor"
- Principal Investigator, KO8 funding 12/98 - 11/02, $431,947 over three years
(no-cost extension to continue through 11/30/2002)

NIH RO1 "Tachykinin regulation of anxiety and stress responses"
Principal Investigator, funding 9/1/2002 – 8/30/2007
$1,287,000 over 5 years

12) Departmental and University Committees:

Research Allocation Panel (1996 – 2001)
Institutional Review Board (Alternate Boards 1-2, full member Board 3) (2003 - present)

13) Teaching:

Lecturer and clinical teacher: Anesthesiology Residency Program, Columbia University and Presbyterian Hospital, New York, NY

Advanced Cardiac Life Support Training

Invit _ecturer:

NK1 receptor functions in pain and neural development, Cornell University December 1994

Anxiety, stress, and the NK1 receptor, University of Chicago, Department of Anesthesia and Critical Care, July 2000

Anesthetic Considerations of LVAD Implantation, University of Chicago, Department of Anesthesia and Critical Care, July 2000

NK1 receptor function in stress and anxiety, St. John's University Department of Medicinal Chemistry, March 2002

Making a brave mouse (and making a mouse brave), Mt.Sinai School of Medicine, May 2002

Anesthetic considerations of LVAD implantation. Recurrent lecture at Columbia University LVAD implantation course.

14) Grant Review Committees: None

15) Publications:

Original peer reviewed articles

- Santarelli, L., Gobbi, G., **Debs, P.C.**, Sibille, E. L., Blier, P., Hen, R., **Heath, M.J.S.** (2001). Genetic and pharmacological disruption of neurokinin 1 receptor function decreases anxiety-related behaviors and increases serotonergic function. **Proc. Nat. Acad. Scl.**, 98(4), 1912 – 1917.

- King, T.E. [δ], **Heath M. J. S**[δ]., Debs, P, Davis, MB, Hen, R, Barr, G. (2000). The development of nociceptive responses in neurokinin-1 receptor knockout mice. Neuroreport.;11(3), 587-91 δ authors contributed equally to this work

- **Heath, M. J. S.**, Lints, T., Lee, C. J., Dodd, J. (1995). Functional expression of the tachykinin NK_1 receptor by floor plate cells in the embryonic rat spinal cord and brainstem. **Journal of Physiology** 486.1, 139 -148.

- **Heath, M. J. S.**, Womack M. D., MacDermott, A. B. (1994). Subsance P elevates intracellular calcium in both neurons and glial cells from the dorsal horn of the spinal cord. **Journal of Neurophysiology** 72(3), 1192 - 1197.

McGehee, D. S., **Heath, M. J. S.**, Gelber, S., DeVay, P., Role, L.W. (1995) Nicotine enhancement of fast excitatory synaptic transmission in the CNS by presynaptic receptors. **Science** 269, 1692 - 1696.

Morales D, Madigan J, Cullinane S, Chen J, **Heath, M. J. S.**, Oz M, Oliver JA, Landry DW. (1999). Reversal by vasopressin of intractable hypotension in the late phase of hemorrhagic shock. Circulation. Jul 20;100(3):226-9.

LoTurco, J. J., Owens, D. F., **Heath, M. J. S.**, Davis, M. B. E., Krigstein, A. R. (1995). GABA and glutamate depolarize cortical progenitor cells and inhibit DNA synthesis. **Neuron** 15, 1287 - 1298.

Kyrozis A., Goldstein P. A., **Heath, M. J. S.**, MacDermott, A. B. (1995). Calcium entry through a subpopulation of AMPA receptors desensitized neighboring NMDA receptors in rat dorsal horn neurons. **Journal of Physiology** 485.2, 373 - 381.

McGehee, D.S., Aldersberg, M. , Liu, K.-P., Hsuing, S., Heath, M.J.S. , Tamir, H. (1997). Mechanism of extracellular Ca^{2+}-receptor stimulated hormone release from sheep thyroid parafolicular cells. **Journal of Physiology**: 502,1, 31 - 44.

Kao, J., Houck, K., Fan, Y., Haehnel, I., Liguttl, S. K., Kayton, M. L., Grikscheit, T., Chabot, J., Nowygrod, R., Greenberg, S., Kuang, W.J., Leung, D. W., Hayward, J. R., Kisiel, W., **Heath, M. J. S.**, Brett, J., Stern, D. (1994). Characterization of a novel tumor-derived cytokine. **Journal of Biological Chemistry** 269, 25106 - 25119.

Dodd, J., Jahr, C.E., Hamilton, P.N., **Heath, M.J.S.**, Matthew, W.D., Jessell, T.M. (1983). Cytochemical and physiological properties of sensory and dorsal horn neurons that transmit cutaneous sensation. **Cold Spring Harbor Symposia of Quantitative Biology** 48, 685 -695.

Pinsky, D.J., Naka, Y., Liao, H., Oz, M. O., Wagner, D. D., Mayadas, T. N., Johnson, R. C., Hynes, R. O., **Heath, M.J.S.**, Lawson, C.A., Stern, D.M. Hypoxia-induced exocytosis of endothelial cell Weibel-Palade bodies. **Journal of Clinical Investigation** 97(2), 493 - 500.

Case reports none

Review, chapters, editorials

- **Heath, M. J. S.**, Dickstein, M. L. (2000). Perioperative management of the left ventricular assist device recipient. Prog Cardiovasc Dis.;43(1):47-54.

- Dickstein, M.L., Mets B, **Heath M.J.S.** (2000). Anesthetic considerations during left ventricular assist device implantation. Cardiac Assist Devices pp 63 – 74.

- **Heath, M. J. S.** and Hen, R. (1995). Genetic insights into serotonin function. **Current Biology** 5.9, 997 -999.

- **Heath, M.J.S.**, Mathews D. (1990). Care of the Organ Donor. **Anesthesiology Report** 3, 344-348.

- **Heath, M. J. S.**, Basic physiology and pharmacology of the central synapse. (1998) **Anesthesiology Clinics of North America** 15(3), 473 - 485.

Abstracts

Heath, M.J.S., Davis, M., Santarelli L., Hen H. (2002). Gene targeting of the NK1 receptor blocks stress-evoked induction of c-Fos in the murine locus coeruleus. IARS American-Japan Congress A-15.

Heath, M.J.S., Davis, M., Santarelli L., Hen H. (2002). Gene targeting of the NK1 receptor blocks stress-evoked induction of c-Fos in the murine locus coeruleus. Anesthesiology 95:A-811.

Heath, M.J.S., Davis, M., Santarelli L., Hen H. (2002). Expression of Substance P and NK1 Receptor in the Murine Locus Coeruleus and Dorsal Raphe Nucleus. Anesthesia and Analgesia 93; S-212

Heath, M.J.S., Davis, M., Santarelli L., Hen H. (2002). Expression of Substance P and NK1 Receptor in the Murine Locus Coeruleus and Dorsal Raphe Nucleus. Anesthesia and Analgesia 93; S-212.

Heath, M.J.S., Santarelli L, Hen H. (2001) The NK1 receptor is necessary for the stress-evoked expression of c-Fos in the paraventricular nucleus of the hypothalamus. Anesthesia and Analgesia 92; S233.

Heath, M.J.S., Santarelli L, Debs P, Hen H. (2000). Reduced anxiety and stress responses in mice lacking the NK1 receptor. Anesthesiology 93: 3A A-755.

Heath, M.J.S., King, T., Debs, P.C., Davis M., Hen R., Barr G. (2000). NK1 receptor gene disruption alters the development of nociception. Anesthesia and Analgesia; 90; S315.

Heath, M.J.S., Lee, J.H., Debs, P.C., Davis, M. (1997). Delineation of spinal cord glial subpopulations expressing the NK1 receptor. Anesthesiology; 87; 3A; A839.

Heath, M.J.S., MacDermott A.B. (1992). Substance P elevates intracellular calcium in dorsal horn cells with neuronal and glial properties. Society for Neuroscience Abstracts; 18; 123.1.

Heath, M.J.S., Lee C.J., Dodd J. (1994). Ontogeny of NK1 receptor-like immunoreactivity in the rat spinal cord. Society for Neuroscience Abstracts; 20; 115.16.

Heath, M.J.S., Berman M.F. (1991) Isoflurane modulation of calcium channel currents in spinal cord dorsal horn neurons. Anesthesiology 75; 3A; A1037.